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No. 10-397

In the Supreme Court of the United States

HEATHCLIFFE JOHN BRADLEY, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Visa Waiver Program (VWP), aliens from designated countries who intend to visit the United States for business or pleasure for no more than 90 days may enter without a visa, but as a condition of that visa-free entry, the alien must "waive[] any right * * * to contest, other than on the basis of an application for asylum, any action for removal of the alien." 8 U.S.C. 1187(b)(2). Under a separate provision, an alien admitted under the VWP is eligible, based on marriage or other immediate family relationship to a United States citizen, to apply for the discretionary benefit of "adjustment of status" to that of lawful permanent resident. 8 U.S.C. 1255(a) and (c)(4). The question presented is:

Whether an alien who waived his rights under the VWP and who has overstayed the term of lawful admission may contest his removal by applying for adjustment of status and demanding the right to present that application to an immigration judge in removal proceedings.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 16
Appendix A – Decision denying motion to reconsider (Nov. 18, 2010) 1a
Appendix B – Decision denying motion to reconsider (Nov. 1, 2010) 16a

TABLE OF AUTHORITIES

Cases:

Bayo v. *Napolitano*, 593 F.3d 495 (7th Cir. 2010) 3, 8, 9
Elkins v. *Moreno*, 435 U.S. 647 (1978) 4
Ferry v. *Gonzales*, 457 F.3d 1117 (10th Cir. 2006) 12
Freeman, In re, 489 F.3d 966 (9th Cir. 2007) 13
Freeman v. *Gonzales*, 444 F.3d 1031 (9th Cir. 2006) 11, 13
Handa v. *Clark*, 401 F.3d 1129 (9th Cir. 2005) 3, 13
Lacey v. *Gonzales*, 499 F.3d 514 (6th Cir. 2007) 9
McCarthy v. *Mukasey*, 555 F.3d 459 (5th Cir. 2009) ... 9, 12
Momeni v. *Chertoff*, 521 F.3d 1094 (9th Cir. 2008) 9, 11, 12
Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) 3
Schmitt v. *Maurer*, 451 F.3d 1092 (10th Cir. 2006) 9
Yauri, In re, 25 I. & N. Dec. 103 (B.I.A. 2009) 14
Zine v. *Mukasey*, 517 F.3d 535 (8th Cir. 2008) 9

Statutes and regulations: Page

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359:
§ 117, 100 Stat. 3384 11
§ 313(a), 100 Stat. 3437 11
§ 313(c), 100 Stat. 3438 11
8 U.S.C. 1101(a)(15)(B) 1
8 U.S.C. 1151(b)(2)(A)(i) (Supp. III 2009) 4
8 U.S.C. 1182(a)(7)(B)(i)(II) 1, 13
8 U.S.C. 1184(a)(1) (Supp. III 2009) 5
8 U.S.C. 1187(a) (2006 & Supp. III 2009) 2, 13
8 U.S.C. 1187(b) 2, 11, 13
8 U.S.C. 1187(b)(2) 8, 10
8 U.S.C. 1201(a)(1)(B) 2
8 U.S.C. 1201(g) 2
8 U.S.C. 1227(a)(1)(B) 5
8 U.S.C. 1229a 3, 4, 5
8 U.S.C. 1252 3
8 U.S.C. 1252(a)(2)(B)(i) 4
8 U.S.C. 1255(a) 3, 9, 10
8 U.S.C. 1255(c) 4
8 U.S.C. 1255(c)(2) 10, 11
8 U.S.C. 1255(c)(4) 4, 9, 10, 11, 12
8 C.F.R.:
Section 103.2(b)(15) 4
Section 103.3(a)(1)(ii) 4
Section 204.1(a)(1) 4
Section 204.2 4

Regulations—Continued: Page

Section 214.1(a)(3)(ii) 5
Section 217.2(a) 2
Section 217.2(b)(1) 2
Section 217.4(a)(1) 2
Section 217.4(b) 5
Section 217.4(b)(1) 3, 12
Section 217.5(c) 2
Section 245.2(a)(1) 4
Section 245.2(a)(3)(ii) 4
Section 245.2(a)(5)(ii) 4, 5, 12
Section 1003.1(b)(5) 4
Section 1208.2(c) 3
Section 1208.2(c)(1)(iv) 3
22 C.F.R.:
Section 41.12 1
Section 41.31 1
Section 41.101 2
Section 41.102 2

Miscellaneous:

73 Fed. Reg. 67,354 (2008) 2
H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1 (1986) 13
H.R. Rep. No. 564, 106th Cong., 2d Sess. (2000) 13

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OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-17a) is reported at 603 F.3d 235.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 2010. A petition for rehearing was denied on June 21, 2010 (Pet. App. 24a-25a). The petition for a writ of certiorari was filed on September 20, 2010 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. An alien who wishes to visit the United States temporarily for business or pleasure ordinarily must obtain a nonimmigrant visitor's visa (B-visa). 8 U.S.C. 1182(a)(7)(B)(i)(II); 22 C.F.R. 41.12, 41.31; see 8 U.S.C.

1101(a)(15)(B) (definition of nonimmigrant visitor for business or pleasure). Such visas generally are obtained by applying, in person, to a United States Embassy or Consulate abroad. See 8 U.S.C. 1201(a)(1)(B); 22 C.F.R. 41.101, 41.102. Visa applications may be denied. See, *e.g.*, 8 U.S.C. 1201(g).

Through the Visa Waiver Program (VWP), however, aliens from designated countries may seek admission to the United States for up to 90 days as nonimmigrant visitors for business or pleasure without needing to obtain a nonimmigrant visitor's visa. 8 U.S.C. 1187(a) (2006 & Supp. III 2009).[1] To be eligible to obtain admission under the VWP, the alien must agree to waive any right (1) to administrative or judicial review of an immigration officer's determination as to admissibility, and (2) any right "to contest, other than on the basis of an application for asylum, any action for removal of the alien" after admission. 8 U.S.C. 1187(b). Applicants who do not execute a waiver of such rights "may not" be granted a visa waiver and will be refused admission and usually removed promptly. *Ibid.*; see 8 C.F.R. 217.4(a)(1). At the time pertinent to this case, applicants for admission executed the waiver at the time of admission by signing Form I-94W, an Arrival-Departure Record. See 8 C.F.R. 217.2(b)(1).[2]

Pursuant to the waiver, aliens admitted under the VWP who fail to comply with the terms of admission (including timely departing the United States) are not entitled to proceedings before immigration judges (IJs),

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[1] Designated countries are listed in 8 C.F.R. 217.2(a).

[2] Beginning in January 2009, aliens must execute the waiver of rights before departure for the United States, using the online Electronic System for Travel Authorization. See 8 C.F.R. 217.5(c); 73 Fed. Reg. 67,354 (2008).

except when they apply for asylum.[3] Removal decisions are instead made by the Department of Homeland Security (DHS). See 8 C.F.R. 217.4(b)(1) (removal of an alien admitted under the VWP "shall be effected without referral of the alien to an immigration judge for a determination of deportability, except * * * [for] an alien * * * who applies for asylum in the United States"), 1208.2(c)(1)(iv) (alien who is admitted under the VWP and overstays his 90-day authorization is "not entitled to [removal] proceedings under [8 U.S.C. 1229a]") (emphasis omitted). In proceedings before DHS, aliens may dispute their alleged identity and alienage, whether their last admission or entry into the United States actually was under the VWP, whether they validly waived their procedural rights, or the scope of the waiver. See, *e.g.*, *Handa* v. *Clark*, 401 F.3d 1129, 1133 (9th Cir. 2005).[4]

If DHS issues a VWP removal order, review lies directly in the court of appeals under 8 U.S.C. 1252. See Pet. App. 2a n.1 (citing cases). The scope of review, however, is limited to the same issues that could have been raised before DHS. See *ibid.*; *Bayo* v. *Napolitano*, 593 F.3d 495, 500 (7th Cir. 2010) (en banc).

b. Adjustment of status is a discretionary procedure by which the Secretary of Homeland Security allows an alien who has been "admitted or paroled into the United States" to become a lawful permanent resident. 8 U.S.C. 1255(a). Several categories of admitted aliens are ineli-

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[3] Aliens who pursue asylum claims are referred to immigration court for "asylum only" proceedings. 8 C.F.R. 217.4(b)(1), 1208.2(c).

[4] DHS retains prosecutorial discretion in appropriate cases to forbear from seeking to remove an alien from the United States. Cf. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-484 (1999).

gible to seek adjustment of status. 8 U.S.C. 1255(c). As relevant here, an alien admitted pursuant to the VWP is ineligible *unless* he is an "immediate relative" of a United States citizen. 8 U.S.C. 1255(c)(4). An "immediate relative" is defined to mean a spouse, parent, or child, with certain exceptions. 8 U.S.C. 1151(b)(2)(A)(i) (Supp. III 2009).

The exercise of discretion to adjust an alien's status is "a matter of grace, not right." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). To pursue that discretionary benefit for an immediate relative, the citizen relative must first file a visa petition on Form I-130 with U.S. Citizenship and Immigration Services (USCIS), a component of DHS. Form I-130 establishes the immediate-relative relationship and the citizen relative's intention to obtain a visa for the alien relative. 8 C.F.R. 204.1(a)(1), 204.2. If an I-130 petition is denied, the denial may be appealed to the Board of Immigration Appeals (Board), except that no appeal is permitted if the petition is abandoned and denied for that reason. 8 C.F.R. 103.2(b)(15), 103.3(a)(1)(ii), 1003.1(b)(5).

Meanwhile, the alien relative, if in the United States, must submit to USCIS an application to adjust status on Form I-485. 8 C.F.R. 245.2(a)(1) and (3)(ii). After examining the alien's eligibility to adjust status, USCIS makes a discretionary decision whether to grant the benefit. That decision is not directly appealable. See 8 U.S.C. 1252(a)(2)(B)(i); 8 C.F.R. 245.2(a)(5)(ii). In some cases, however, when USCIS denies an adjustment application, the alien may obtain administrative review by renewing the application in immigration court, if removal proceedings under 8 U.S.C. 1229a are initiated. See 8 C.F.R. 245.2(a)(5)(ii). Not all aliens are subject to that kind of removal proceeding, however (and even

when they are, not all aliens' adjustment applications can be renewed there, see *ibid.*). As discussed above, aliens admitted under the VWP have no right to immigration court proceedings to contest their removal, and they therefore may not renew an adjustment-of-status application before an IJ. See *ibid.* ("Nothing in this section shall entitle an alien to [removal] proceedings under [8 U.S.C. 1229a] who is not otherwise so entitled.").

2. Petitioner, a citizen and national of New Zealand, arrived in the United States on August 28, 1996, without a valid nonimmigrant visa. Pet. App. 2a-3a. He was admitted under the VWP after he signed a form containing the required waiver of rights and presented the form to a customs officer upon arrival. *Id.* at 4a. The term of his admission was 90 days, or until November 27, 1996, but he has unlawfully remained in the United States ever since he arrived 14 years ago. *Ibid.*

In 2006, ten years after his arrival, petitioner married a United States citizen. Pet. App. 4a. The couple applied to USCIS for an immigrant visa and adjustment of petitioner's status to lawful permanent resident, but they failed to prosecute the applications by appearing for their scheduled interview. As a result, both applications were denied as abandoned in June 2008. *Id.* at 4a-5a, 20a-23a; App., *infra*, 4a-5a. Such denials are not appealable, see p. 4, *supra*, and the Board therefore dismissed for lack of jurisdiction an attempted appeal of the visa denial.

On October 8, 2008, petitioner was arrested and ordered removed by Immigration and Customs Enforcement because he had overstayed the 90-day period of admission under the VWP. Pet. App. 5a, 18a-19a; see also 8 U.S.C. 1184(a)(1) (Supp. III 2009), 1227(a)(1)(B); 8 C.F.R. 214.1(a)(3)(ii), 217.4(b). Petitioner was re-

leased from detention, see Pet. 4, and has not yet been removed.

3. Petitioner sought review of his removal order in the court of appeals. He contended that the removal order was invalid and that he was entitled, as an immediate relative, to renew his adjustment application before an IJ in removal proceedings. Pet. C.A. Br. 14-46.

4. The court of appeals denied the petition for review. Pet. App. 1a-17a.

As relevant here, the court of appeals concluded that petitioner "may not, after the expiration of his 90-day stay, adjust his status as a defense to removal." Pet. App. 16a. The court joined the unanimous view of six other circuits in so holding. See *id.* at 15a & n.7.

The court explained that petitioner has waived the right to object to removal on any ground except for asylum. Pet. App. 15a.[5] Petitioner's attempt to challenge his removal based on his desire to renew an adjustment application that he filed long after he overstayed his 90-day visit, the court held, was the sort of objection to removal that petitioner waived. *Ibid.*

The court of appeals reserved the question whether, as one other circuit has held, a VWP alien may renew his application in immigration court if it is first timely filed during the 90-day admission period. Such a holding would not benefit petitioner, the court stated, because

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[5] Petitioner devoted much of his briefs in the court of appeals to arguments that he did not sign the waiver and that, if he did, his waiver was not knowing and voluntary. The court of appeals rejected those arguments, holding that, even if a heightened standard applied, the government had "easily" met its burden of proving that petitioner signed the waiver and petitioner had not shown any prejudice from his supposedly unknowing signature. Pet. App. 8a; see *id.* at 5a-14a. Petitioner does not renew his attacks on his waiver in this Court.

he "petitioned for an adjustment of status years beyond the expiration of his authorized stay." Pet. App. 16a.

5. The court of appeals denied rehearing en banc without recorded dissent. Pet. App. 24a-25a.

6. After petitioner was ordered removed, petitioner and his wife filed with USCIS a new visa petition and application for adjustment of status. Pet. C.A. Br. 11 n.8. The visa petition was approved in 2009. On March 3, 2010, however, while this case was pending in the court of appeals, USCIS denied petitioner's adjustment application as a matter of discretion—not as a matter of eligibility. Among the grounds cited for the denial was petitioner's unauthorized employment in the United States and his overall disregard of the immigration laws. App., *infra*, 5a-6a.

Petitioner moved USCIS for reconsideration. Although initially USCIS denied reconsideration on grounds of ineligibility, citing the court of appeals' decision, App., *infra*, 16a-19a, USCIS subsequently withdrew that decision *sua sponte* and issued a new order denying reconsideration on the merits, not on grounds of ineligibility for adjustment of status. *Id.* at 1a-15a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of another court of appeals. Seven courts of appeals, including the court below, have concluded that an alien who obtains visa-free admission for 90 days by signing the VWP's waiver of rights,[6] and who then overstays the 90-day period of lawful admission, cannot belatedly contest his removal or trigger proceedings before an IJ by filing an applica-

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[6] Petitioner does not contest the voluntariness of his waiver in this Court. See note 5, *supra*.

tion for adjustment of status *after* overstaying. That holding correctly implements the statute specifying that aliens admitted under the VWP give up the right to contest their removal. The court of appeals did not address the further question whether aliens in petitioner's position may pursue adjustment of status outside the context of removal proceedings, and petitioner's assertions about USCIS's practices in granting or denying adjustment therefore are not relevant to the proper disposition of this case. Indeed, since the court of appeals' decision, petitioner himself has been denied adjustment of status on the merits and as a matter of discretion, not based on a per se rule of ineligibility. For those reasons, further review is not warranted.

1. a. Following the decisions of six other circuits, the court of appeals here correctly decided that an alien admitted into the United States under the VWP may not contest his removal based on an adjustment application filed after the 90-day period of lawful admission under the VWP. Pet. App. 14a-17a. Agreeing with a unanimous en banc decision of the Seventh Circuit, the court held that an alien admitted pursuant to the VWP waives "any objection to removal (except for asylum), including one based on adjustment of status." *Id.* at 15a (quoting *Bayo* v. *Napolitano*, 593 F.3d 495, 507 (7th Cir. 2010) (en banc)); see 8 U.S.C. 1187(b)(2) ("An alien may not be provided a waiver under the [VWP] unless the alien has waived *any* right * * * to contest, other than on the basis of an application for asylum, any action for removal of the alien.") (emphasis added). By specifying that asylum is the sole exception to the VWP's blanket waiver of contesting removal, Congress made clear that DHS is not required to make any further exception, including for adjustment of status. The courts of appeals

thus have uniformly concluded that an alien who is admitted pursuant to the VWP and overstays beyond the 90-day period of lawful admission cannot thereafter resist removal based on an application for adjustment of status. Pet. App. 15a & n.7; *Bayo*, 593 F.3d at 507; *McCarthy* v. *Mukasey*, 555 F.3d 459, 462 (5th Cir. 2009) (per curiam); *Momeni* v. *Chertoff*, 521 F.3d 1094, 1097 (9th Cir. 2008); *Zine* v. *Mukasey*, 517 F.3d 535, 543 (8th Cir. 2008); *Lacey* v. *Gonzales*, 499 F.3d 514, 519 (6th Cir. 2007); *Schmitt* v. *Maurer*, 451 F.3d 1092, 1097 (10th Cir. 2006).

In contending that the unanimous view of the courts of appeals is incorrect, petitioner relies on the statutory provision specifying eligibility to seek adjustment of status. In general, VWP aliens are excepted from eligiblity to seek adjustment of status, but those who qualify as immediate relatives fall within an exception to the exception. See 8 U.S.C. 1255(c)(4). Immediate relatives therefore are subject to the general rule that DHS *may* grant adjustment of status, "in [its] discretion and under such regulations as [it] may prescribe." 8 U.S.C. 1255(a). But nothing in that general rule, or in Section 1255(c)(4), provides that VWP aliens who are immediate relatives must be able to seek adjustment of status *in removal proceedings*. To the contrary, as the court of appeals explained, VWP aliens have waived any opportunity to use adjustment of status, or any ground except an application for asylum, to challenge removal. Pet. App. 15a (citing *Bayo*, 593 F.3d at 507). The court of appeals' reading gives effect to that statutorily required waiver.[7]

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[7] Petitioner also errs in suggesting (Pet. 15-18) that VWP aliens must be able to seek adjustment of status in removal proceedings to avoid

For the same reasons, petitioner errs in arguing (Pet. 13-14) that Section 1255(c)(4) is more "specific" than, and thus must control over, the statute specifying that a VWP alien "waive[s] *any* right * * * to contest, other than on the basis of an application for asylum, any action for removal of the alien," 8 U.S.C. 1187(b)(2) (emphasis added). The two statutes address different points: Section 1255(a) and (c)(4) governs a VWP alien's eligibility to seek adjustment of status generally; Section 1187(b)(2) specifically controls a VWP alien's ability to seek immigration benefits other than asylum *in removal proceedings*. Because a VWP alien who is an immediate relative may seek adjustment of status *outside* removal proceedings—in the manner specified "under [DHS] regulations," 8 U.S.C. 1255(a)—there is no conflict between the two statutes.

Petitioner's reliance on 8 U.S.C. 1255(c)(2) is similarly unavailing. Section 1255(c)(2) provides that an alien (whether or not admitted pursuant to the VWP) is ineligible to seek adjustment of status if he "is in unlawful immigration status on the date of filing the application of adjustment of status," or if he "has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status" in the United States since entering the country. An alien who is an immediate relative is exempted from that disqualification, see 8 U.S.C. 1255(c)(2), and therefore remains subject to the general rule that DHS *may* grant adjustment of status, "in [its] discretion and under such regulations as [it] may prescribe." 8 U.S.C. 1255(a). Thus, Section 1255(c)(2), like Section 1255(c)(4), pertains only to the

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"[n]ulli[fying]" Section 1255(c)(4). Pet. 15 (boldface omitted). See note 10, *infra*.

alien's eligibility to seek adjustment of status, not to whether the alien may use an application for adjustment of status as a basis to resist removal.[8]

b. One court of appeals has concluded that if a VWP alien submits a timely application for adjustment of status *during* the 90-day admission period, and that application is subsequently denied and the alien is ordered to leave the country, the alien may renew the timely application before an IJ in removal proceedings. See *Momeni*, 521 F.3d at 1096-1097; *Freeman* v. *Gonzales*, 444 F.3d 1031, 1033-1034, 1035-1037 (9th Cir. 2006). The Ninth Circuit has made clear, however, that aliens in petitioner's situation—VWP aliens who overstay their 90-day admission period *without* timely seeking adjustment of status—may not subsequently contest their removal by seeking adjustment of status before an IJ. *Momeni*, 521 F.3d at 1096-1097. And the court of appeals in this case did *not* decide the effect of an application timely filed within the 90-day admission period, because "even if [the court] adopted" the Ninth Circuit's rule, such a holding would not benefit petitioner. Pet. App. 16a.

The Ninth Circuit based its decision on the premise that a VWP alien who files an application for adjustment of status while lawfully in the United States has a right under the applicable *regulations* to renew adjustment applications before an IJ. See *Freeman*, 444 F.3d at 1035. Even if that premise were correct—a question not presented here—it plainly would not apply to aliens in petitioner's position, who seek to use an adjustment-of-

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[8] Significantly, the relevant provisions of 8 U.S.C. 1187(b) and 1255(c)(2) and (4) were all adopted at the same time. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 117, 313(a) and (c), 100 Stat. 3384, 3437-3439.

status application as a basis for resisting removal. The regulation on which the *Freeman* panel relied expressly states that it does not confer a right to removal proceedings in immigration court on any alien "who is not otherwise so entitled," 8 C.F.R. 245.2(a)(5)(ii), and VWP admittees have waived any right to such a removal proceeding.[9] See *Ferry* v. *Gonzales*, 457 F.3d 1117, 1127-1128 (10th Cir. 2006); see also 8 C.F.R. 217.4(b)(1).

Petitioner contends (Pet. 6, 11-12, 15) that he should be treated the same way as an alien who files for adjustment of status within the 90-day admission period, because although he overstayed the admission period by nearly ten additional years before filing, he filed his adjustment application before DHS initiated removal proceedings. He therefore argues that his adjustment application was not a challenge to removal. But this case is an attempt to obtain judicial review of the order to remove petitioner from the United States, and to use adjustment as a means of avoiding removal. That is squarely within petitioner's VWP waiver. See *McCarthy*, 555 F.3d at 460-462; *Ferry*, 457 F.3d at 1126-1127.[10]

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[9] The *Freeman* panel did not address the effect of that regulatory provision, and the Ninth Circuit has not revisited that issue in light of its subsequent conclusion that aliens in petitioner's position cannot, *after* overstaying, contest their removal by seeking adjustment of status before an IJ. *Momeni*, 521 F.3d at 1096-1097.

[10] Petitioner contends (Pet. 15-16) that to give any effect to Section 1255(c)(4), which recognizes that VWP aliens who are immediate relatives are eligible to seek adjustment of status, those aliens must be able to do so beyond the 90-day admission period, because aliens who marry U.S. citizens soon after entry may be presumed to have misrepresented their intent to travel to the United States only temporarily. Petitioner waived that argument in the court of appeals, Pet. App. 17a n.8, and it is not correct in any event. First, as discussed above, eligibility to seek adjustment of status is distinct from eligibility to seek that discretion-

c. The court of appeals' decision is also consistent with the purpose and function of the VWP. In exchange for waiving rights to contest removal and seeking only a limited 90-day period of lawful admission, VWP admittees are able to avoid the inconvenience of applying for a B-visa before their travel—and the possibility that the visa might be denied in their individual cases. See 8 U.S.C. 1182(a)(7)(B)(i)(II), 1187(a) and (b) (2006 & Supp. III 2009); see also H.R. Rep. No. 564, 106th Cong., 2d Sess. 7 (2000) (2000 House Report). In return, the United States gains not only broad benefits—significantly reduced demands on Department of State overseas resources, increased economic activity by foreign visitors to the United States, improved international relations, and increased availability of reciprocal visa waiver benefits for United States citizens traveling abroad—but also the ability to remove any VWP alien rapidly when circumstances warrant. See 2000 House Report 7-8; H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 50 (1986); see also *Handa* v. *Clark*, 401 F.3d 1129, 1135 (9th Cir. 2005). If VWP admittees were able to

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ary relief *in a removal proceeding*. Second, petitioner incorrectly suggests that the only way for a VWP alien to qualify as an immediate relative is to marry a U.S. citizen after entry. A VWP alien may have immediate-relative status (parent, sibling, or spouse) at the time of entry, see, *e.g.*, *Freeman*, 444 F.3d at 1032 (alien married before entering under VWP), and even if not, the State Department manual provisions on which petitioner relies easily accommodate marriages that occur more than 30 days after entry, as petitioner acknowledges (Pet. 16). What matters is each alien's intent at the time of entry; as the Ninth Circuit has acknowledged, there is no conflict between the proposition that VWP aliens are not categorically ineligible for adjustment of status and the proposition that individual VWP aliens may be ineligible based on misrepresentations at the time of entry. See *In re Freeman*, 489 F.3d 966, 969 (9th Cir. 2007) (per curiam).

enter without obtaining a visa by consenting to streamlined removal, and then to evade or delay that streamlined removal simply by filing an adjustment application, the delicate balance struck by Congress among the many interests underlying the VWP would be upended.[11]

Petitioner's challenge to the court of appeals' holding therefore is unavailing.[12]

2. Petitioner contends (Pet. 6-10) that review by this Court is warranted to resolve a conflict between the courts of appeals and agency practice concerning *eligibility* for adjustment of status. Petitioner contends that USCIS has previously granted adjustment applications filed by aliens in petitioner's position, *i.e.*, VWP aliens who overstayed their 90-day period and sought adjustment only later. Indeed, petitioner's first question presented seeks review of the question whether petitioner "may adjust his status." Pet. i; see also Pet. 12, 15.

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[11] Petitioner's appeal to principles of family unity and cost savings (Pet. 18-21) neither outweighs these countervailing considerations nor warrants adopting petitioner's statutory interpretation. Moreover, DHS itself remains able to take into account family unity, resource constraints, and any other relevant considerations in deciding how best to proceed against a removable VWP admittee—including forbearing in appropriate cases from obtaining or executing a removal order while an adjustment application proceeds before USCIS. See note 4, *supra*; cf. *In re Yauri*, 25 I. & N. Dec. 103, 106-107 (B.I.A. 2009) (USCIS may grant adjustment of status to an arriving alien even after issuance of a removal order). Further, as petitioner recognizes (Pet. 17 n.2), even if DHS decides to remove him, it remains possible for him to pursue an immigrant visa from overseas and to gain lawful permanent resident status in this manner, provided he obtains any necessary waivers.

[12] Petitioner also invokes a rule of lenity (Pet. 14-15), but there is no ambiguity on the face of the relevant statutes, and even if there were, the traditional tools of statutory interpretation, the statutory purpose, and the agency's own interpretive authority would resolve it without the need to resort to any rule of lenity.

No such question and no such conflict are presented by this case. The court of appeals explained that petitioner "may not, after the expiration of his 90-day stay, adjust his status *as a defense to removal*." Pet. App. 16a (emphasis added). The court of appeals did not opine on whether petitioner remains eligible for USCIS to grant him adjustment as a matter of its discretion. Thus, petitioner's assertion (Pet. 7-10, 21) that USCIS's determinations concerning eligibility to seek adjustment have been inconsistent and "random[]" is based not on anything that has happened to petitioner's own application, but on a single, anecdotal newspaper article and on an informal poll reported in a practice manual. See Pet. 9.

Indeed, petitioner himself has been able to file applications for adjustment. USCIS has considered those applications notwithstanding petitioner's lengthy violation of the terms of his admission to the United States. And petitioner's most recent such application has already been denied on the merits, based on facts specific to petitioner. See p. 7, *supra*. Although USCIS, in denying reconsideration of that decision, initially suggested that the court of appeals' decision established that petitioner is ineligible to seek adjustment, USCIS has withdrawn that determination and again denied petitioner's application on the merits. See *ibid.*; App., *infra*, 1a-15a. Petitioner offers no reason to believe that USCIS's disposition of his petition would change if this Court granted review and held that petitioner is *eligible* for a discretionary grant of relief (Pet. i). This case therefore does not present any such eligibility question.

Rather, the only question decided below and properly presented here is whether petitioner may contest removal based on his adjustment application. As petitioner acknowledges, the courts of appeals unanimously

agree that he may not. No further review of that question is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

DONALD E. KEENER
W. MANNING EVANS
Attorneys

NOVEMBER 2010

APPENDIX A

U.S. Department of Homeland Security
Citizenship and Immigration Services
Newark Field Office
970 Broad Street
Newark, NJ 07102

[SEAL OMITTED] **U.S. Citizenship and Immigration Services**

Heathcliffe John BRADLEY File: A87 074 865
[ADDRESS OMITTED] Date: [Nov. 18, 2010]

RE: Motion to Reconsider filed on April 7, 2010.

See attached decision on the above referenced matter.

Sincerely,

/s/ KIMBERLY ZANOTTI
KIMBERLY ZANOTTI
Field Office Director

JMD / Regular mail

cc: Harry ASATRIAN, Esq.

www.dhs.gov

ATTACHMENT

Date: [NOV. 18 2010]

File #: A87 074 865

Subject: Heathcliffe John BRADLEY

In Re: Motion to Reconsider Denial

Discussion:

Reference is made to the **Form I-290B, Notice of Appeal or Motion** (hereinafter referred to as the motion), filed on your behalf by your attorney, Harry ASATRIAN, on April 7, 2010 in connection with your Application to Register Permanent Residence or Adjust Status, (hereinafter referred to as your I-485). The basis of the motion is set forth in documents submitted in support. The fee receipt is dated April 7, 2010, which becomes the filing date for purposes of this decision. Your attorney filed this motion at the Newark Field Office. At the time of the filing, the following was submitted by your attorney:

(i) Form I-290B (with the appropriate fee),
(ii) A cover letter from the attorney of record,
(iii) A brief in support of the Motion dated April 2, 2010 signed by your attorney, and
(iv) A copy of the Service decision dated March 3, 2010.

The motion was originally denied on November 1, 2010 and later reopened on a Service motion on November 17, 2010.

The record reflects that you are a native and citizen of New Zealand and a beneficiary of an approved visa petition in immediate relative category as a spouse of a United States citizen. Your record with this Service reflects the following history:

The record reflects that you had entered the United States numerous times between 1983 and 1996. It revealed that you made 2 **entries as a G4, an International Organization Officer or Employee, or Immediate Family Member**: (i) on or about December 14, 1983, you entered the United States at or near Los Angeles, California and later departed on or about December 17, 1985, and (ii) on or about January 1, 1986, you made your entry at or near Honolulu, Hawaii and later departed on or about August 2, 1986. The Service record further reveals that you had made 4 **entries as a B2, a Visitor for Pleasure**: (i) on or about January 13, 1990, you entered at or near Honolulu, Hawaii and later departed on February 4, 1990; (ii) on or about December 19, 1990, you were inspected and admitted at or near Honolulu, Hawaii and consecutively departed the United States on or about January 21,1991; (iii) on or about December 29, 1992, you were inspected and admitted at or near Honolulu, Hawaii and later departed on or about January 25, 1993; and (iv) on or about June 05, 1993, you were inspected and admitted at or near Honolulu, Hawaii and departed on or about June 9, 1993. In addition, the Service record further reflects that you had made 5 **entries** into the United States **under the Visa Waiver Pilot Program** (hereinafter referred to as the VWP), pursuant to Section 217

of the Act as amended [1]: (i) on or about April 9, 1994, (ii) on or about September 12, 1994, (iii) on or about March 4, 1996, (iv) on or about May 26, 1996, and (v) on or about August 28, 1996. When you last entered, you were required to depart the United States on or before November 27, 1996. You remained in the United States past that date in violation of the United States immigration laws. *See* INA Section 237(a)(1)(C)(I).

The Service record reflects that on or about July 29, 2006, over 9 years and 11 months after your last entry into the United States, you married your United States citizen wife, Cheryl Denise LOSEE (hereinafter referred to as Cheryl). On or about December 11, 2007, Cheryl filed **Petition for Alien Relative, Form I-130** (hereinafter referred to the first visa petition) on your behalf. Concurrently with the filing of the first visa petition, an **Application to Register Permanent Residence or Adjust Status, Form I-485** (hereinafter referred to as your first I-485), to seek adjustment to the status of lawful permanent residence under Section 245 was filed by

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[1] Section 217 of the Act, as amended, states in pertinent part that:

[. . .] a [Visa Waiver] *program [. . .] under which the requirement of* [a visa] *may be waived by the Attorney General in consultation with the Secretary of State [. . .] in the case of a alien who meets* [certain statutory] *requirements [. . .].*

Section 217(b) of the Act, as amended, states in pertinent part that:

Waiver of rights. *An alien may not be provided a waiver under the* [visa waiver program for certain citizens] *unless the alien has waived any right—(1) to review or appeal under the Act of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, OR (2) to contest, other than on the basis of an application for asylum, any action for removal of the alien.*

you. On June 5, 2008, the first visa petition and your first I-485 were properly denied by the Service pursuant to 8 C.F.R. § 103.2(b)(13) for your failure to appear twice for your scheduled interview and for your failure to show good cause for your failure to appear. On October 8, 2008, the United States Immigration and Customs Enforcement, Detention and Removal Operations (hereinafter referred to as ICE DRO) issued an order of removal under section 217 of the Act. The same day, you were placed under arrest and transported to the Elizabeth Detention Facility pending removal from the United States. On or about October 27, 2008, Cheryl filed her second **Petition for Alien Relative, Form I-130** (hereinafter referred to as the second petition) on your behalf. Concurrently with the filing of the second visa petition, you filed an **Application to Register Permanent Residence or Adjust Status, Form I-485** (hereinafter referred to as your second I-485) seeking to adjust your status to that of a lawful permanent resident, i.e., a relief from your removal order. On November 10, 2008, the United States Court of Appeals for the Third Circuit granted your motion for a stay of removal based on the pendency of the second visa petition and second I-485. On April 20, 2009, you and Cheryl appeared for your interview at the Newark Field Office in connection with Cheryl's second visa petition and your second I-485. On September 16, 2009, the second visa petition was approved.

On March 3, 2010, the Service issued a decision denying your I-485 as a matter of discretion. In reaching its decision, the Service considered the following *favorable factors*: (i) you being a spouse of a United States citizen, and (ii) you being a beneficiary of an approved Form

I-130, Petition for Alien Relative (hereinafter referred to as the visa petition), filed on your behalf by your United States citizen wife. The Service noted, however, that your visa petition was approved after your removal order had been issued.[2] In addition, the Service considered the following unfavorable factors: (i) your outstanding order of removal, (ii) your overstayed admission, (iii) your violation of terms of your admission, (iv) your numerous prior admissions under the VWP and the number of VWP waivers previously executed, (v) your non-compliance with the VWP waiver, (vi) your marriage to a United States citizen spouse outside of 90 days following your arrival, (vii) your unauthorized employment, and (viii) your overall disregard of the United States immigration laws. The Service concluded that negative factors in your case substantially outweigh the positive factors and that you had failed to establish that your adjustment application merits favorable discretion.

On April 7, 2010, your attorney filed this motion to reconsider. On April 22, 2010, the United States Court of Appeals for the Third Circuit rendered its decision regarding your Petition for Review by the court. On November 1, 2010, the Service issued its original decision on you motion. On November 17, 2010, the Service reopened the denial of the reconsideration motion.

The Service will now reconsider the motion filed on your behalf on April 7, 2010. As stated before, the motion was filed with a brief signed by your attorney. In the brief, your attorney makes the following points:

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[2] Equities acquired after an order of deportation is issued are entitled to less weight than equities acquired during alien's authorized stay in the United States. *Wang v. INS*, 622 F.2d 1341, 1346 (9th Cir. 1980). *Ghassan v. INS*, 972 F.2d 631, 631-35 (5th Cir. 1992).

(i) **"Negative factors arise out of a single fact"**: The attorney states that three factors mentioned in the I-485 decision arise out of a single fact, i.e., you overstaying the terms of your entry and as such do not warrant four separate unfavorable factors, i.e., (i) outstanding removal order, (ii) overstaying terms of admission, (iii) violation of terms of admission, and (iv) disregard to US immigration laws. The ALM on-line dictionary[3] provides definitions of "a factor" and "a fact". "A factor" is defined as something that contributes to the final result while "a fact" is defined as an actual thing or happening, which must be proved at trial by presentation of evidence and which is evaluated by the finder of fact (a jury or the judge). In general, where an applicant is seeking discretionary relief from removal or deportation, the courts are required to weigh favorable equities or factors against unfavorable ones. Pursuant to section 245 of the Act, as amended, the adjudication of Form I-485 involves a similar weighing of favorable equities or factors against the unfavorable factors in order to determine whether to grant a discretionary benefit. In its decision, the Service considered the fact of you overstaying the terms of your admission as one of the unfavorable factors as well as consequences of your overstaying as additional unfavorable factors. The Service sees no feasible way to encompass all four factors into one as suggested by your attorney.

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[3] *See: http://dictionary.law.com*

(ii) **"The Field Office Director did not wait for the 3rd Circuit Court decision to permit a clearer resolution"**: Your attorney claims that the Service issued its March 3, 2010 decision without waiting for the decision of the Third Circuit Court. When issuing a decision on a pending case, the Service is not required by the statute, internal policy, and/or case law to wait for a final outcome of pending court litigation.

(iii) **"The Field Office Director did not consider all of the applicable law."**: The attorney refers to the following case law: *Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010) (en banc); *Nose v. Att'y Gen.*, 993 F.2d 75, 79 (5th Cir. 1993); *Khouzam v. Attorney General*, 549 F.3d 235, 258 (3d Cir. 2008) and one unpublished decision from the 11th Circuit Court. In his brief submitted in support of the Motion, your attorney refers mostly to decisions that were rendered by courts from jurisdictions outside of the Third Circuit and one unpublished decision and, as such, not binding. The case law cited by your attorney was addressed in the Third Circuit Court decision. For the purposes of this decision, the Service will rely on the case law interpretation provided by the court. As stated in the Third Circuit Court decision:

> *[. . .] we reject Bradley's contention that, under Khouzam v. Attorney General, 546 F.3d 235, 258 (3d Cir. 2008), we should presume substantial prejudice because Bradley received no process at all. Our*

Court held in Khouzam, that non-VWP petitioner was "inherently" and "substantially prejudiced" by a "complete absence of any process," when the government, without notice or a hearing, terminated the petitioner's deferral of removal [. . .]. Distinct from Bradley, however, the petitioner in Khouzam did not waive his due process rights, and no-statute conditioned his admission to the United States on an express waiver of these rights. [. . .]

(iv) **"The decision incorrectly applies the law regarding Mr. Bradley's eligibility to apply for adjustment of status."**: Your attorney purported that the Service relied on non-binding precedent decisions from other district courts. The Service disagrees with the assessment. In its decision, the Service referred to a number of, no just two, non-binding precedent decisions from other district courts to show a trend in adjudication of adjustment of status application filed by applicants who entered under the VWP. The Service decision to deny your second I-485 was not based on the non binding case law but rather on discretionary considerations.

(v) **"The government has failed to meet its duty of proving by clear, unequivocal, and convincing evidence [. . .] that Mr. Bradley in fact signed a VWP waiver, he should not be strictly bound by the terms of that waiver [. . .] the waiver is incorrectly presumed to be valid [. . .]"**: The Service contests that assessment.

Section 217(b) of the Act, as amended, states in pertinent part that:

> *Waiver of rights. An alien may not be provided a waiver under the* [visa waiver program for certain visitors] *unless the alien has waived any right—(1) to review or appeal under the Act of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or (2) to contest, other than on the basis of all application for asylum, any action for removal of the alien.*

An applicant for admission under the VWP can be admitted under the program if and only if he or she had signed a waiver of his/her rights to review, contest, and/or appeal any determination of his/her inadmissibility or any removal action (with a narrow exception for asylum claims).[4] If such a waiver is not executed

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[4] At the time of your admission, the waiver was executed by signing the reverse side of Form I-94, Nonimmigrant Visa Waiver Arrival/Departure Form.

by the applicant for admission, he/she is denied admission.

The record establishes by clear and convincing evidence that your last admission in to the United States was under the VWP, possible if and only if the waiver had been signed by the applicant for the admission. On your first and second I-485, you stated that you had been admitted to the United States under the VWP on August 28, 1996. In support of your second I-485, you submitted a copy of **Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form**, reflecting your admission under the VWP on August 28, 1996. In addition, the Service record reflects your admission under the VWP on or about August 28, 1996. As previously stated, the record reflects that it was your fifth admission under the VWP. The Service asserts that the evidence of record constitutes clear and convincing evidence of your execution of the VWP waiver on August 28, 1996.

(vi) **"Unauthorized Employment and Overstaying Should Not Be Considered Negative Factors for *Immediate Relatives*"**: Your attorney cites 8 CFR section 245.1(b)(1)-(4) and argues that your unauthorized employment and overstaying should not be considered as negative factors. 8 CFR section 245.1(b)(1)-(4) lists categories of aliens who are not eligible to apply for adjustment of status pursuant to section 245(a) and must qualify for adjustment under section 245(i) of the Act in order to be eligible

to apply. The list contains individuals who engaged in unlawful employment. The regulation makes exception for immediate relatives; as defined in 201(b) of the Act. 8 CFR section 245.1(b)(1)-(4) defines classes of aliens not eligible for adjustment of status and it does not refer to discretionary considerations of factors that are favorable and/or unfavorable to the applicant. The Service did not use unauthorized employment and the fact that you overstayed your visa to determine statutory eligibility for adjustment of status. Instead, these factors were used in the discretionary analysis. Unauthorized employment and disregard for the immigration laws by overstaying one's visa are negative factors to be considered in the exercise of discretion especially if other negative considerations are present. *Matter of Khan*, 17 I&N Dec. 508 (BIA 1980).

The attorney also cites *Matter of Cavazos*, 17 I&N Dec. 215 (BIA 1980) in support of his claim that "immediate relatives" as defined in section 201(b) of the Act seeking to adjust status in the United States are entitled to preferential treatment. In the *Matter of Cavazos, supra*, the Board of Immigration Appeals stated what follows:

> *Where a* ***finding of preconceived intent was the only negative factor*** *cited by the immigration judge in denying the respondent's application for adjustment of status as the beneficiary of an approved immediate relative visa petition* ***AND no additional ad-***

> ***verse matters are apparent*** *in the record* ***AND where significant equities are presented*** *by the respondent's United States citizen wife and child, a grant of adjustment of status is warranted as a matter of discretion.* (Emphasis added)

The issue in that case was preconceived intent. Preconceived intent was not the issue in your case. In addition and as discussed in the Service denial, there are additional adverse matters in the record.

(vii) **"The decision disregards several positive factors"**: You attorney stated that many positive factors were overlooked in the decision, such as: your lengthy presence in the United States and your good moral character. He cited a memorandum written by an Immigration and Naturalization Service (a predecessor of this Service) Commissioner and dated November 27, 2000 but he failed to produce a copy of the said memorandum. The attorney refers also to *Matter of Francois*, 10 I&N Dec. 168, 170 (BIA 1963) which states that in determining whether an application for adjustment merits the favorable exercise of discretion one of the factors to be considered is applicant's good moral character for a reasonable period of time. The Act, as amended lists nine (9) classes of persons who are not of good moral character in section 101(f). You do not seem to fall within any of the nine listed classes, however, section 101(f) of the Act, as amended, states also as follows:

> *The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. [. . .]*

The Service acknowledges that the record contains no history of arrests nor criminal activity, however, as stated in the Service decision, the record reflects numerous unfavorable factors pertaining to your disregard of terms of your admission and your overall disregard of U.S. immigration laws. In the absence of other proof to the contrary, those unfavorable factors do not warrant a finding of good moral character. You failed to provide proof of your good moral character with the motion.

(viii) **"The decision is inconsistent with Service Precedent"**: Your attorney alleged that the Service decision is not consistent with the Service precedent. He purported that the Service "*routinely adjusted statuses of VWP overstays who marry U.S. citizens*". Your attorney stated further that "*on information and belief, USCIS Newark Field Office has adjudicated and adjusted many VWP overstays who have not only overstayed but also had final orders issued by ICE*". Each case is reviewed on its own merits. In this case, the Service has determined that you do not warrant a favorable exercise of discretion.

Title 8 of the Code of Federal Regulations, Section 103.5(a)(3) states that

> *Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration* ***AND*** *be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition* ***MUST****, when filed, also establish that the decision was incorrect based on evidence of record at the time of the initial decision.*

Title 8 of the Code of Federal Regulations, Section 103.5(a)(4) states that:

> *Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed. [. . .]*

Your adjustment of status application was denied by the Service based on discretion. You have failed to establish that the Service decision was based on an incorrect application of law or Service policy. Based on the foregoing, the motion to reconsider the denial of your adjustment of status filed on April 7, 2010 is hereby denied.

APPENDIX B

U.S. Department of Homeland Security
Citizenship and Immigration Services
Newark Field Office
970 Broad Street
Newark, NJ 07102

[SEAL OMITTED] **U.S. Citizenship and Immigration Services**

Heathcliffe John BRADLEY
[ADDRESS OMITTED]

File: A87 074 865
Date: [Nov. 1, 2010]

RE: Motion to reconsider filed on April 7, 2010.

See attached decision on the above referenced matter.

Sincerely,

/s/ KIMBERLY ZANOTTI
KIMBERLY ZANOTTI
Field Office Director

JMD / Regular mail

cc: Harry ASATRIAN, Esq.

www.dhs.gov

ATTACHMENT

Date:

File #: **A87 074 865**

Subject: Heathcliffe John BRADLEY

In Re: Motion to Reconsider Denial

Discussion:

Reference is made to the **Form I-290B, Notice of Appeal or Motion** (hereinafter referred to as the motion), filed on your behalf by your attorney, Harry ASATRIAN, on April 7, 2010 in connection with your Application to Register Permanent Residence or Adjust Status, (hereinafter referred to as your I-485)[1]. The basis of the motion is set forth in documents submitted in support. The fee receipt is dated April 7, 2010, which becomes the filing date for purposes of this decision. Your attorney filed this motion at the Newark Field Office. At the time of the filing, the following was submitted by your attorney:

(i) Form I-290(B),
(ii) A cover letter from the attorney of record,
(iii) A brief in support of the Motion dated April 2, 2010 signed by your attorney, and

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[1] You are the beneficiary of an approved Form I-130, Petition for Alien Relative (hereinafter referred to as I-130), in the immediate relative category as a spouse of a United States citizen. On or about December 11, 2007, you filed an Application to Register Permanent Residence or Adjust Status, Form I-485 (hereinafter referred to as your I-485) to seek adjustment to the status of lawful permanent resident based on the approved I-130. You I-485 was denied by the Service on March 3, 2010.

(iv) A copy of the Service decision dated March 3, 2010.

On April 22, 2010, the United States Court of Appeals for the Third Circuit rendered its decision regarding your Petition for Review filed with the court on or about October 14, 2008. *See Bradley v. Attorney General*, 603 F.3d 235 (3rd Cir. 2010). In its decision, the court found that:

> *We agree and hold that, although Bradley was once statutorily eligible under 8 U.S.C. § 1255(c)(4) for the adjustment he now seeks, he may not, after the expiration of his 90-day stay, adjust his status as a defense to removal. Bradley's VWP waiver squarely forecloses him from contesting his removal on this basis.*

The United States Court of Appeals for the Third Circuit denied your Petition for Review based on the finding that you are ineligible to contest your removal order[2] by filing for adjustment of status when such filing took place outside of your lawful 90-day stay[3].

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[2] Your removal order under section 217 of the Immigration and Nationality Act was issued on October 8, 2008 by the United States Immigration and Customs Enforcement, Detention and Removal Operations (hereinafter referred to as ICE DRO).

[3] You last entered the United States on or about August 28, 1996 under the Visa Waiver Pilot Program (hereinafter referred to as the VWP), pursuant to Section 217 of the Act. It was your fifth entry under the VWP. At the time of your entry, you were authorized to remain in the United States for a period not to exceed 90 days.

In the light to the decision, you are found ineligible for adjustment of status. Based on the foregoing, the motion to reconsider the denial of your adjustment of status filed on April 7, 2010 is hereby denied.